

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-6104

B

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-6104

ALFRED KIRSHNER
98 Van Cortlandt Park South
Bronx, New York 10463
Phone: 212 543 9038

Plaintiff-Pro Se
Appellant

VS

UNITED STATES OF AMERICA
SECRETARY OF THE TREASURY
COMMISSIONER OF I.R.S.
ALVIN D. LURIE in his capacity
as Asst. Commissioner
Employer Plans & Exempt
Organizations. I.R.S.
c/o U.S. Attorney Civil Division
1 St. Andrews Plaza, 5th Floor
New York, New York

BERNARD GOLDBERG
REUBEN MITCHELL
JOSEPH SHANNON
ROBERT CHRISTEN
VICTOR CONDELLO
HARRISON GOLDIN
JAMES REGAN

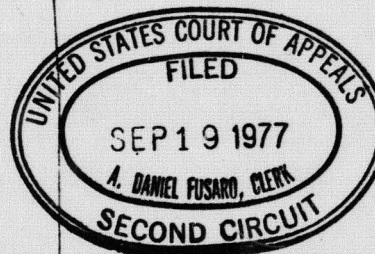
Individually as Trustees of Teachers Retirement System
of City of New York, 40 Worth Street, New York, N. Y.

Isaah Robinson
110 Livingston Street, Brooklyn, New York
Individually as Former Trustee, "TRS".

Defendants-Appellees

APPENDIX
FOR
PLAINTIFF-APPELLANT

P/S



OFFICE OF COUN. COUNSEL

77 SEP 27 P12:58

LAW DEPARTMENT
CITY OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KIRSHNER, ALFRED

U.S.A.
et al.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK.

CASE NO. 77 CIV 665

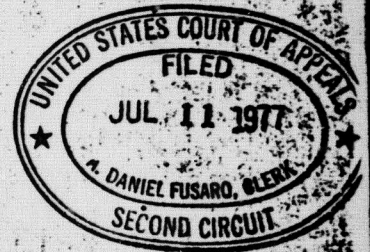
JUDGE: PIERCE

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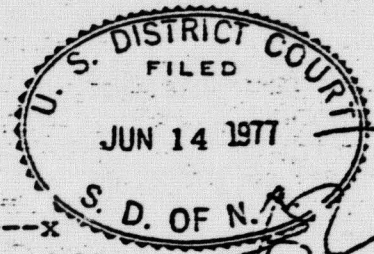
- 1-3
1. Certified copy of docket entries
2. Filed complaint. Issued summons.
3. Filed order appointing Agents of the Aetna Judicial Service, as process server....Clerk.
4. Filed Affidvt. of service of summons & complaint served:
Isaiah Robinson, personal served on 2/15/77.
Harrison Golden, by Joseph Russo, on 2/15/77.
Victor Condello, by Joseph Russo, on 2/15/77.
James Regan, by Joseph Russo, on 2/15/77.
Robert Christen, by Joseph Russo, on 2/15/77.
Joseph Shannon, by Joseph Russo, on 2/15/77.
Reuben Mitchell, by Joseph Russo, on 2/15/77.
Bernard Goldberg, by Joseph Russo, on 2/15/77.
5. Filed summons with Marshals return served:
Atty. General Wash. D.C. by certified mail receipt #955137 on 2-11-77.
U.S. Atty. Civil Division, by Mrs. Pauline P. Troia, on 2-11-77.
U.S. Atty. Civil Division by Mrs. Pauline P. Troia, on 2-11-77.
U.S. Atty. Civil Division by Mrs. Pauline P. Troia, on 2-11-77.
6. Filed Pltffs. notice to Amended the complaint.
7. Filed Defts. (TRS) affidvt. and notice of motion for an order dismissing the complaint herein for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter and for such other and further relief as the Court deems just and proper. Ret. 4-12-77.
8. Filed notice of reassessment to Judge Pierce. m/n
9. Filed Pltffs. notice of motion for an order, pursuant to Rule 65(a) of the F.R.Civ.P., preliminarily enjoining deft. TRS trustees from the sale of TRS corporate assets to purchase N.Y. City obligations. Ret. 3-12-77.
10. Filed Pltffs. affidvt. in support of a motion for Preliminary Injunction.
11. Filed Pltff's memorandum on defts. motion to dismiss complaint.
12. Filed Pltff's interrogatories Set. No. One.
13. Filed Pltff's interrogatories Set. No. Two.
14. Filed defts. notice of motion for order dismissing the complaint as against them for lack of jurisdiction or in the alternative, for failure to state a claim upon which relief can be granted. Ret. 4-21-77
15. Filed memorandum of law in support of federal defts' motion to dismiss and in opposition to pltff's motion for a preliminary injunction.
16. Filed Pltffs. memorandum on federal defts. motion to dismiss.
17. Filed Pltffs. Memorandum in support of motion for preliminary injunction.
18. Filed Opinion # 46020... Defts motions to dismiss are granted... Pltff cross motion for preliminary injunction is denied as moot. The complaint is dismissed So ordered. Pierce J. m/n copy sent to pro se.
19. Filed notice of appeal to the 1st CA from order of 6/13/77 dismissing complaint. m/n

CLERKS CERTIFICATE



77-6104

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



ALFRED KIRSHNER,

Plaintiff,

- v -

UNITED STATES OF AMERICA, SECRETARY
OF THE TREASURY, COMMISSIONER OF THE
IRS, ALVIN D. LURIE, in his capacity
as Assistant Commissioner, Employer
Plans & Exempt Organizations, IRS,
BERNARD GOLDBERG, RUEBEN MITCHELL,
JOSEPH SHANNON, ROBERT CHRISTEN, VICTOR
CONDELLO, HARRISON J. GOLDIN, JAMES
REGAN, individually and as Trustees
of the Teachers' Retirement System of
the City of New York, and ISAAH ROBINSON,

Defendants.

77 Civ. 665
(Pro Se)

#46020

APPEARANCES:

ALFRED KIRSHNER, ESQ.
98 Van Cortlandt Park South
Bronx, New York 10463

Plaintiff, Pro Se

W. BERNARD RICHLAND, ESQ.
Corporation Counsel of the City
of New York
By: JAMES G. GREILSHEIMER, ESQ.,
Litigating Assistant Corporation Counsel
Municipal Building
New York, New York 10007

Attorney for the Trustees of the Teachers'
Retirement System of the City of New York

ROBERT B. FISKE, JR.
United States Attorney for the Southern
District of New York
By: KENT T. STAUFFER, ESQ.
WILLIAM G. BALLAINE, ESQ.
Assistant United States Attorneys

Attorneys for the United States of America, et al.

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LAWRENCE W. PIERCE, D.J.

MEMORANDUM AND ORDER

A
Plaintiff Alfred Kirshner brings this action seeking an injunction against certain investments made in securities of the Municipal Assistance Corporation by the defendant Trustees of the Teachers' Retirement System of the City of New York ("the Trustees"). Plaintiff also seeks judicial review of the actions of the Internal Revenue Service implementing special legislation passed by Congress, PL 94-236 (March 19, 1976), which statute permitted the Trustees to make the investments challenged herein without risking the loss of the System's tax exempt status. Finally, Kirshner seeks a declaratory judgment that PL 94-236 is unconstitutional and seeks an injunction barring its enforcement.

Plaintiff is a retired New York City school teacher, and he alleges a vested right in his \$3,000 annual pension. The gravamen of the amended complaint is the claim that the investments made by the Trustees and approved by the IRS have and will continue to jeopardize plaintiff's interest in the financial integrity of the billion-dollar funded assets of the retirement system. Plaintiff has moved for a preliminary injunction; the defendants have moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The motions to dismiss are granted.

The amended complaint alleges that jurisdiction is present pursuant to 28 U.S.C. §1331 and 1343, as well as pursuant to the Administrative Procedure Act, 5 U.S.C. §702. It is claimed that the actions of the defendant Trustees have violated 42 U.S.C. §1983 by depriving plaintiff of his constitutional rights under the contract clause, Art. I, Section 10, and under the due process and equal protection clauses of the fourteenth amendment. The Trustees are also said to have violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934, as well as Rule 10b-5 thereunder. Finally, the Trustees are charged with breach of fiduciary duty.

As against the defendant the United States, its agencies and its officers, plaintiff seeks review of administrative action, and a declaratory judgment pursuant to 28 U.S.C. §2201 that PL 94-236 is unconstitutional; plaintiff further seeks an injunction enforcing two provisions of the Internal Revenue Code, 26 U.S.C. §§401 and 403, which allegedly would bar the purchases at issue if not for the enactment of PL 94-236. Finally, plaintiff claims that the federal defendants have deprived him of due process in violation of the fifth amendment and of his contract rights under the contract clause; he also claims that the federal officials have violated the securities laws.

This action is not the first to raise a constitutional attack against the investment policies of New York City employee retirement pension funds. See Sgaglione v. Levitt, 37 N.Y.2d 507, 337 N.E.2d 592, 375 N.Y.S.2d 79 (1975); Withers v. Teachers' Retirement System, 76 Civ. 4474 (S.D.N.Y. Dec. 22, 1976); Tron v. Condello, 427 F.Supp. 1175 (S.D.N.Y. 1976). These cases have carefully considered the facts and the law as it applies to this matter; thus many of the claims made here are capable of summary disposition based upon precedent which this Court finds highly persuasive.

Plaintiff's claim that the actions of the defendants violate the contract clause, Art. I, Section 10, must be dismissed for failure to state a claim. That provision grants to plaintiff no right to seek judicial review of the investment decisions of the Trustees. See Sgaglione, supra; Tron v. Condello, supra, 427 F.Supp. at 1188-89.

The same conclusion must be reached with respect to plaintiff's due process claims. While plaintiff may well have a vested property interest in his pension, he has no right to regulate the investment policies of the defendants. Tron v. Condello, supra, 427 F.Supp. at 1189-90. As Judge Conner observed in that case, to the extent plaintiff claims breach of fiduciary duty, that claim is cognizable in state court.

Kirshner makes an equal protection argument not raised in Tron, to wit, that the actions of the Trustees

have discriminated against retired teachers while continuing to favor presently employed teachers. The Court concludes that this claim must similarly be dismissed for failure to state a claim, since it is but another method whereby plaintiff seeks to overturn the discretionary investment decisions made by the Trustees. See Sgaglione, supra; Tron v. Concello, supra. Indeed, even if plaintiff's equal protection argument were not foreclosed by the thrust of the state and federal decisions cited above, the claim must fall since the investment decisions of the Trustees have a rational basis and since the distinction between present and retired teachers is not a distinction which would be subjected to strict judicial scrutiny. Rather, under the "relatively relaxed standard" of judicial review, it is apparent that the actions of the Trustees bear a rational relationship to a legitimate state goal, i.e., the protection of the fiscal integrity of the City of New York. See generally Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam); Dandridge v. Williams, 397 U.S. 471, 485 (1970). Accordingly, each of the three constitutional claims brought against the Trustees must be dismissed for failure to state a claim.

Nor do plaintiff's claims under the federal securities laws state a claim. It is undisputed that Kirshner was not a purchaser or a seller of the securities in issue. Thus he has no standing to assert a private cause

of action under Section 10(b) or under Rule 10b-5. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

Further, plaintiff has no claim under Section 17(a) of the Securities Act since there exists no private cause of action based upon that statute. See Welch Foods, Inc. v. Goldman Sacks & Co., 398 F.Supp. 139 (S.D.N.Y. 1974). Accordingly, all federal claims asserted against the Trustees must be dismissed. The pendent state law claims for breach of fiduciary duty must similarly be dismissed without prejudice to their assertion in a state court action. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

Plaintiff seeks review of the actions of the federal defendants pursuant to the Administrative Procedure Act, 5 U.S.C. §702. In order to seek review under that section, the plaintiff must be a "person aggrieved" by agency action. Id. A possible financial loss is not itself a sufficient interest to sustain a judicial challenge to agency action. Abbott Laboratories v. Gardner, 387 U.S. 136, 153 (1967). The agency action challenged here is the approval by an Internal Revenue Service Assistant Commissioner of the investment plans of the Trustees. The agency did not mandate the investment; it simply ruled that the investments would not jeopardize the retirement fund's tax-exempt status. This action is so many levels removed from the interest asserted by the plaintiff that the Court is unable to conclude that Kirshner has standing to challenge it. The A.P.A. does not

confer standing upon any person who might suffer financial loss as a result of agency action; rather, the action must directly violate plaintiff's vested legal rights. See Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency, 310 F.2d 99, 104 (7th Cir. 1962), cert. denied, 373 U.S. 914 (1963). Plaintiff's "unadorned speculation" that the agency action will result in a direct injury to him is insufficient to confer jurisdiction under the A.P.A., or indeed, under the Constitution's Article III, Section 2 generally. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 44 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975). Further, plaintiff's other federal claims against the federal defendants are defective for the same reasons that they fail to state a federal claim against the Trustees.

Even if the Court were to proceed to the merits of plaintiff's claim that PL 94-236 is unconstitutional, it is clear that the attack must fail. The statute cannot violate the contract clause, since that section applies to state legislation, not to the enactments of Congress. New York v. United States, 257 U.S. 591, 602 (1922). The due process claim must fall since, for the reasons stated earlier, Kirshner has no vested property right in controlling the investment decisions of the Trustees. Nor is plaintiff deprived of any property right by reason of the alleged retroactive application of PL 94-236, since the law merely

continued the tax exempt nature of the retirement fund, and since the retroactive period was sufficiently short to effect only the then-current fiscal year of the Teachers' Retirement System. Such a brief retroactive application does not serve to invalidate an income tax statute. See United States v. Hudson, 299 U.S. 498, 500-01 (1937). Accordingly, the due process attack on PL 94-236 must fail.

Under the cases cited previously, plaintiff's equal protection attack upon PL 94-236 must fail since the legislation has a reasonable relationship to the legislative goal, i.e., the fiscal preservation of the City of New York. See, e.g., the legislative findings set forth in the New York Seasonal Financing Act of 1975, 31 U.S.C. §1501. Further, the classification between present and retired teachers is not one which requires strict scrutiny of the Congressional action. See Massachusetts Board of Retirement, supra; cf. Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

For the foregoing reasons, it is apparent that plaintiff's complaint fails to state any federal claim upon which relief can be granted. Even under the less stringent standard applied to pro se complaintis, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief."

Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see Haines v. Kerner, 404 U.S. 519 (1972) (per curiam). The motions to dismiss are hereby granted. Plaintiff's cross-motion for a preliminary injunction is denied as moot. The complaint is dismissed.

SO ORDERED.

Dated: New York, New York
June 13, 1977



LAWRENCE W. PIERCE
U. S. D. J.

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF N.Y.

ALFRED KIRSHNER
98 Van Cortlandt Park South
Bronx, N. Y. 10463
Phone: 543 9038 Plaintiff

CIVIL ACTION No. 77 CIV 665

LWP
(+BWL)

vs

United States of America.
Secretary of the Treasury.
Commissioner of I. R. S.
Alvin D. Lurie in his capacity
as Asst. Commissioner
Employer Plans & Exempt
Organizations, I. R. S.
c/o U.S. Attorney Civil Division
1 St. Andrews Plaza, 5th Floor
New York, N. Y.

Bernard Goldberg
Reuben Mitchell
Joseph Shannon
Robert Christen
Victor Condello
Harrison Golden
James Regan
Individually as "TRUSTEES" of TEACHERS
RETIREMENT SYSTEM OF CITY OF N. Y.
40 Worth Street, New York, N. Y.

Isaah Robinson Defendants
110 Livingston Street
Brooklyn, N. Y.
Individually as former "TRUSTEE" "TRS"

JURY TRIAL DEMANDED

COMPLAINT

COUNT I

JURISDICTION VENUE & NATURE OF ACTION

1. This complaint by the plaintiff seeks injunctions to
prevent the defendant "TRUSTEES" from dissipating and reducing the assets of the

Teachers Retirement System of the City of New York, herein referred to as "TRS", by their illegal actions; to prevent the enforcement of PL 94-236 and obtain a declaratory judgment ruling such law unconstitutional; full restitution for losses sustained thru violation of Article 1, Section 10 and the Fifth and Fourteenth Amendments of the Constitution of the U.S., of 42 USC section 1983, of 26 USC 401 and 503, of SEC Act 1934 Section 10 (b) and Rule 10 b-5, of 15 USC 78j(b); and judicial review and relief under 5 USC 702/706 to secure enforcement of 26 USC 401, 503.

2. This Court has jurisdiction of this action under the Constitution of the U.S., 5 USC 702/706, 28 USC 1331, 28 USC 1343 (1) & (3), 28 USC 2201, SEC Act 1934 Section 10 (b) and Rule 10 b-5, and 15 USC 78J (b).

3. "TRS" is located at 40 Worth Street, New York, N.Y. and is the address of the defendant "TRUSTEES" most of whose acts charged herein occurred within the jurisdiction of this Court.

4. Defendants used the mail and telephones, instrumentalities of interstate commerce in connection with the alleged acts complained of.

5. The matter in controversy exceeds the sum of \$10,000. exclusive of interest and costs.

PARTIES

6. Plaintiff is Alfred Kirshner who resides in New York City and was employed by the NYC Board of Education as a High School Science teacher for 25 years when he retired for disability. Since then he has been receiving a monthly retirement

allowance from "TRS". Retirement date February 19, 1953. Plaintiff accepted employment and made monthly contributions from his salary to "TRS" with the expectation that his monies and those contributed by the City as part of its contractual obligation, to his individual account would be treated as trust funds and his contractual rights honored. He has an equity interest in "TRS" Fixed Annuity Funds. Present age 69 indicates actuarial expectatant life span of 13 years. With present pensions approximately \$3000. a year the expectant lifetime pension would amount to \$39,000., the value which he seeks to protect .

7. The Defendant USA, Sect. of Treasury et al, is obligated by IRS Laws & Regulations 26USC 401, RR 69-494, 501, & 503 to disapprove of prohibited transactions by qualified tax exempt trusts such as "TRS" and has failed to do so.
8. The individual Defendants are the seven "TRS" "TRUSTEES" and one former Trustee. The three teacher members elected only by presently employed active teachers and school personnel ONLY , are Bernard Goldberg, Reuben Mitchell, and Joseph Shannon. The other four trustees are Harrison Golden, City Controller; Robert Christen, Victor Condello, and James Regan. The former Trustee is Isaah Robinson, 7/26/74 to 7/1/76. The "TRUSTEES" are obligated to act towards the "TRS" members including the plaintiffs, with the highest fiduciary standards. Their liability arises from their failure to do so and by engaging in the unlawful actions described herein.

ALLEGATIONS

- 9a. Plaintiff is a retired NYC employee pensioner. All city and state publicservice employee pensioners are excluded from Erisa and "protected" only by 26 USC 401

and 503. This minority is herein referred to as "PENSIONER MINORITY". The Plaintiff is a member of the "PENSIONER MINORITY" totaling 25,000 retirees of "TRS".

9b. \$1,615,000,000 in the Funded Assets Account of "TRS" is set aside to pay lifetime pensions for those who have retired. (Shinn Report as of June 30, 1974.) This constitutes 87% of the \$1.85 billions in "TRS" Funded assets account on hand as of that date, and amounts to \$64,600 of per capita per individual retiree. Each retiree account is kept individually and funded individually on retirement. The primary interest of this minority is to maintain the integrity of the FUNDED ASSETS FUND to assure payment of pensions.

9c. As of June 11, 1974, "TRS" had approximately 80,000 members who were currently employed in NYC schools. At that time set aside for this group was \$239,300,000. This constitutes only 13% of the Funded Assets on hand as of June 30, 1974. This provides per capita funded assets for currently employed members of \$3,000. Consequently all of the unfunded accrued liability amounting to \$2.7 billions is due this second group of employed members. This is due to the fact that the City has had a contract with the United Federation of Teachers for the past approximately 8 years and pension contributions by present teachers have been reduced by contract as part of salary benefits to a negligible percentage compared to that made by most retired teachers who retired before there was a Union contract and who made sizeable contributions as indicated in part by the huge difference in

individual average per capita funded assets. A primary interest of the currently employed very high salaried school employees is to maintain a NYC cash flow to keep employment and salaries and City pension contributions high and conflicts with the basic interests of the retirees. Currently employed teachers are the only ones permitted to vote for the three teacher "TRS" trustees who have veto power over investments by "TRS" and are thus in a position to use the resources of the retirees for the benefit of the currently employed if it can escape fiduciary responsibility and the requirements of federal IRS laws.

9d. The improper purchasing approval of IRS on December 5 & 13, 1975; the three party "AGREEMENT" of November 26, 1975, ; the passage of NY State #890 law 1975, and PL 94-236, made possible the illegal dissipation and continuing depletion of "TRS" assets by the Defendant "TRUSTEES". In order to maintain UFT contract benefits, full employment at high wages and high city pension contributions to benefit the presently employed teachers - the "TRUSTEES" have illegally been using "TRS" assets to buy highly speculative, poorly rated, illiquid, high risk NY City obligations, and have engaged in illegal acts related in the following paragraphs, causing irreparable property loss and injury and violating the constitutional rights of the plaintiff and the "PENSIONER MINORITY" of "TRS". The members of this minority are old, 86% of them are over 65; 35% are over 75. The average retirement allowance for 1974 was \$6700. a year. Most are poor; 8,000 retirees received less than \$4,000 a year. They are widely scattered, living in many states and abroad; they are isolated, often ill, unorganized, unrepresented, politically powerless, defenseless and vulnerable.

COUNT II

PETITION FOR REVIEW UNDER 5 USC 702/706

Paragraph 1 thru 9 are incorporated herein by reference as though fully set forth.

10. The wrongful acts allegedly committed by the U.S. Treasury Department through Alvin D. Lurie in his capacity as Asst. Commissioner, Employer Plans & Exempt Organizations, IRS, consists of his approval, in letters to "TRS" of December 5 & 13, 1975,; of the purchase of \$182 million of NYC serial bonds at par based on a ruling that such purchases were not prohibited transactions under 503 (b) (1) and would not be deemed diversion of assets under 401 (a).

11. The "TRUSTEES" in their requests to IRS for approval did not make full disclosure in five instances which indicate violations of Security Exchange laws and regulations 10 (b) and Rule 10b-5.

a. They did not disclose the fact that the Clearing House Banks, one of the three parties to the "AGREEMENT", while ostensibly acting as disinterested parties, while using their reputation for fiscal integrity and sound business judgment to induce the "TRUSTEES" to purchase \$860 million of NYC serial bonds, failed to make full disclosure of the fact that they had sold over \$2 billion of their NYC short term notes in the previous year (see Friedlander vs City of NY et al 75 CIV 3891(RO). This would clearly indicate violation of SEC ACT 1934 Sect 10B and rule 10 b-5 and 15 USC 78j (b); "by concealing material facts to which importance could be attached that would affect informed investment decision."

b. They did not disclose the fact the purchase of NYC bonds was made at par when they were available at market at a discount of approximately 20%. Then it would

clearly violate Section 401 Rev. Rule 69-494, "(1) The cost must not exceed the fair market value at time of purchase."

c. They did not disclose the fact the the "TRUSTEES" purchase of \$182 million NYC bonds increased the "TRS" holdings of NYC obligations as of December 15, 1975 to 32%. This would clearly violate Section 401 RR 69-294 (3) which states that "sufficient liquidity must be maintained to permit distribution in accordance with the terms of the plan."

d. They did not disclose the fact that "TRUSTEES" planned to sell \$212 million in sound, varied, highly rated, corporate bonds, at a loss of \$30 million in order to raise cash to buy the \$182 million of NYC bonds. This would clearly violate Section 401 RR 69-494 (4) "the safeguards and diversity that a prudent investor would adhere to must be present."

e. They did not disclose the fact that the sale of \$212 million of sound varied corporate securities at a loss of \$30 million and purchase of inadequately secured NYC bonds, from which tax income was being diverted to pay interest on new MAC bonds, was not for the exclusive benefit of the plaintiff and his class of retirees but was politically expedient and for the benefit of NY City and the U.F.T. This would clearly be a prohibited transaction in violation of IRS 503 (b).

12. The approval of the \$182 million NYC bond purchase by IRS letters of December 5 & 13, 1975 was unlawful under 5 USC 702 because it was arbitrary, not in accord with 26 USC 401 and 503; unwarranted by the facts; contrary to the constitutional rights of the plaintiff by depriving him of property without due process or fair exchange; discriminated against the minority of aged pensioners whose 87%

interest in the Funded assets of "TRS" were leached and dissipated; and denied the plaintiff equal protection of the law as stated in 26 USC 401 & 503, as shown in paragraph 11 above.

COUNT III

WRONGFUL ACTS OF TRUSTEES

Paragraph 1 thru 12 are incorporated herein by reference as though fully set forth.

13. The Defendant "TRUSTEES" knowingly and intentionally deprived plaintiff and the "PENSIONER MINORITY" of their constitutional rights under Article I Section 10 and the fifth and fourteenth Amendments by singling them out as a separate and unequal minority, treating them differently and discriminating against them by entering into an illegal "AGREEMENT"; between the NYC Clearing House Banks, the NYC Sinking Funds and the five NYC Employee Pension Funds on November 26, 1975. In this "AGREEMENT" the "TRUSTEES" intent to manipulate and deceive was expressly indicated by the "AGREEMENT". (see paragraph 7E (iii) (vi) (vii).) Paragraph 7e (iii) states that the "AGREEMENT" would become effective only after a State law was passed which would meet the "TRUSTEES" satisfaction regarding their legal status. This turned out to be State law 890 L 1975 which absolved them of fiduciary responsibility in advance of their contemplated purchase of an additional \$860 million NYC bonds. Paragraphs 7e(vi) and (vii) made the "AGREEMENT" effective only if a statement of approval of the purchase was forthcoming from IRS. Failing that they demanded a federal law which would exempt them from the governing Federal laws which they would be violating by completing

the \$860 million deal. (Specifically IRS 401, and 503, thus eliminating illegally and unconstitutionally federal supervision and restraint.)

14. These two demands of the "TRUSTEES" were satisfied. The NY State Legislature passed Chapter 890 L 1975, which suspended fiduciary responsibility of the trustees of the five NYC employee pension systems by transferring liability for legal actions against them for purchasing NYC obligations to NY City itself. The Congress passed and the President signed PL 94-236 on March 19, 1976 with effective date "August 20, 1975". These two laws, unprecedented in fiduciary history, applied only to the five NYC employee pension funds out of more than 600,000 registered with the Federal Government. They made provision for illegal wrongdoing by legislating "advance" indulgences by reviving and adapting this medieval practice.

15. Defendant "TRUSTEES" proceeded on December 5 & 13, 1975 to illegally sell \$212 million "TRS" assets consisting of sound, liquid, varied, highly-rated corporate bonds which had been bought as trust pension funds are, to hold for maturity and income, at a loss of \$30 million and used the diminished assets to buy at par \$182 million NYC serial bonds which were available at discounts. The \$30 million loss of assets deprived plaintiff and the "PENSIONER MINORITY" of property without just compensation or due process, denied equal protection of the laws, and violated their contractual rights, (Article I Section 10).⁸ The 5th and 14th Amendments of the Constitution; 26 USC 401 and 503. This act also deprived the plaintiff and the minority of public service pensioners, of their constitutional rights under 42 USC 1983.

16. The "TRUSTEES" were well aware that buying NYC bonds at that time was wrongful because the City was insolvent. In April 1975 Standard & Poor had completely suspended rating NYC bonds. Moody's had downrated them to unsatisfactory Caa on November 3, 1975. Both changes were made before the "TRUSTEES" signed the "AGREEMENT" on November 26, 1975. On November 15, 1975 the City had defaulted on its maturing short-term notes and had declared a moratorium on payments. Not one bank, insurance company, investment company, trade union fund or corporation in the USA would at that time advance NYC any funds, but the "TRUSTEES" volunteered to advance \$860 million of the assets of the plaintiff under the "AGREEMENT" paragraph 6, and Schedule B, increasing the holding of this single employers obligations to 51% for June 30, 1978.

17. The Defendant "TRUSTEES" committed an unlawful act by approving and carrying out paragraph 5(b) of the "AGREEMENT" whereby the parties agreed to exchange MAC bonds they held paying 11% interest for MAC bonds with a later maturity date paying 6% interest. "TRS" owns \$275 million in MAC bonds. Its loss of interest from 11% to 6% amounts to \$188 million over fourteen years. There is also the possibility of depreciation in the value of these bonds should they have to be sold before maturity, due to the longer maturity date and lower interest rate. The "TRUSTEES" accepted the reduced 6% rate on Moody-rated B (unsatisfactory) MAC bonds at a time when A's were selling with 8% to 9% returns at par. Only "TRS" and City employee pension fund trustees and the Clearing House Banks agreed to

this reduction in interest and extension of maturity dates. The public bond holders, of equal creditor rank holding MAC bonds did not exchange them for those of lower interest rates. It is contended that those actions were unlawful because of unequal preference. They confiscated property without compensation or due process of law and violated contractual obligations. (Article 1, Section 10 and the 5 & 14 Amendments; 42 USC 1983 and fiduciary law.)

18. The "AGREEMENT" was tainted by fraud by "concealing material facts to which importance could be attached that would affect informed investment decision", and it was not made at arms length. In a legal action (NYS 20061/75 Simpson vs Mitchell et al) an affadavit was filed in November 1975 by William T. Scott, then 3rd Deputy Controller of NYC, who was also signatory to the "AGREEMENT" for the NYC Sinking Funds. In the affadavit Mr. Scott testified that he had bought \$275 million of MAC bonds for "TRS" because they were a sound and prudent investment offering an 11% return favorable and beneficial to "TRS". This affadavit was sworn to November 28, 1975. The "AGREEMENT" was signed by all parties on November 26, 1975. The Defendant "TRUSTEES" arranged with the City of New York to deprive the plaintiff and his class of \$188 million in interest rightfully theirs as part of the "TRS" assets. The inclusion and implementation of paragraph 5(b) providing for the exchange of 11% MAC bonds for 6% MAC bonds in the "AGREEMENT" in the light of the Scott affadavit shows the "AGREEMENT" to be permeated with fraud and therefore void. It violates Rule 10B-5(3) which states:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any national security exchange...

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

19. Defendant "TRUSTEES" committed a wrongful act by approving and implementing paragraph 7c of the "AGREEMENT". Under Paragraph 7c all city bonds due for amortization prior to June 30, 1978 owned by the five NYC employee pension systems, including "TRS", must be renewed with date to be negotiated while under paragraph 7e(i) bank and public holders of serial bonds of NYC due for amortization during this time are to be paid in full. This gives an unlawful, unequal preference to the Clearing House Banks who are parties to the "AGREEMENT" and all other bondholders other than the five City employee pension funds although all are of equal rank as creditors, thus violating the 5 & 14 Amendments and discriminating against the plaintiff and the minority of public employee pensioners. The Clearing House Banks also violated SEC Act 1934 Section 10(b), 15USC 78j(b) by failing to disclose the extent and dollar value of the City bonds held by them as assets and as trustee and fiduciary for clients, concealing material facts that would affect an informed investment decision. Thus "TRS" funds are being used to pay off NYC bonds owned by the Clearing House Banks and their clients at the expense of the minority pensioners, including the plaintiff.

20. Under the "AGREEMENT", Paragraph 7e, "The obligations of the Pension Funds to purchase bonds pursuant to this Paragraph 7 shall be subject to agreement to and fulfillment of such agreements by all parties referred to in this Paragraph 7 and shall be conditioned upon each of the following facts being true on the date of each such purchase." And in 7e(iv) "the City shall have made to the Pension Funds all contributions and other payments required by law."

Article 5 Section 7 of the NY State Constitution forbids diminution or impairment of benefits of membership in any pension or retirement system of the state or civil division thereof. The benefits of "TRS" members are seriously impaired by NYC failing to meet the funding requirements demanded by the \$2.7 billion unfunded accrued liability due "active" members meaning present education employees, according to the Shinn and Kinzel Reports. The "AGREEMENT" has been in effect since November 26, 1975 and the unfunded accrued liability by the City has not been provided for. This nullifies the "AGREEMENT".

21. The wrongful acts of defendants as set forth herein included the use by defendants of telephones and the US Mail, and thus constitute violations of Section 17 (a) of the 1933 SE Act and Section 10(b) of the 1934 SE Act and Rule 10b-5 pursuant thereto.

COUNT IV

Paragraph 1 thru 21 are incorporated herein by reference as though fully set forth.

22. Violation of 42USC 1983 occurred in the performance of each wrongful act enumerated above and makes evident the deliberate, reckless, repeated, breach

of the "TRUSTEES" moral, contractual, statutory and fiduciary duties. The Defendant "TRUSTEES" discriminated against the plaintiff and pensioner minority by violating their constitutional rights causing irreparable injury through the loss of millions of dollars specified above.

23. The discriminatory intent in violation of 42 USC 1983 is shown by the "TRUSTEES" insistence that NY State through legislative action exclude the trustees from fiduciary responsibility before purchasing NYC bonds with assets belonging to minority retirees in the ratio of 87% compared to 13% for the presently employed "TRS" members. Also their insistence on passage of PL94-236 before making extended purchases, and insisting that the assurance be written into the "AGREEMENT"; also by their fraudulent participation in the MAC interest rate reduction by \$188 million and unequal treatment of "TRS" holdings illustrated above. Also by their keeping pensioners uninformed or misinformed. Also by their subservience to the interests of the United Federation of Teachers as exemplified by Mr. Shanker's representation of the teacher "TRUSTEES" at all critical meetings with the Mayor and Governor and the U.F.T. control of the election of Teacher Trustees.

COUNT V

PLEA FOR ENJOINING ENFORCEMENT OF PL 94 236

Paragraph 1 thru 23 are incorporated herein by reference as though fully setforth.

24. PL 94-236, was passed March 19, 1976, with its effective date August 20, 1975,

and violates Article 1, Section 10, of the 5th and 14th Amendments to the Constitution of the U.S. by impairing contractual obligations, depriving the plaintiff and "PENSIONER MINORITY" of property without just compensation or due process of law and equal protection of the law. It discriminates against a minority by singling out only five of thousands of pension systems, to be specifically denied the protection afforded by 26USC 401 and 503. It denies judicial review to that small minority. It denies them protection against trustees engaging in prohibited transactions not for the exclusive benefit of retirees; ^{or} and the federal safeguards for prudence, liquidity and diversity, in the protection of their hardearned life savings, the major source of income for many, if not most NYC employee pensioners. It establishes a bad precedent, encouraging expedient selection of innocent vulnerable pensioners for exploitation by irresponsible officialdom.

25. Under cover of P L 94-236 the "TRUSTEES" from December 5, 1975 to December 31, 1976 illegally purchased \$355,720,000 of NY City bonds, increasing the holding of NYC obligations to \$782 million or 36% of total assets. Unless enjoined they will buy an additional \$504 million in NYC bonds by June 30, 1978, making 51% of "TRS" assets NYC obligations, in accord with the "AGREEMENT". This will destroy the liquidity and solvency of "TRS", and jeopardize payment of pensions for the plaintiff (and the "PENSIONER MINORITY".)

COUNT VI

Paragraph 1 thru 25 are incorporated herein by reference as though fully set forth.

26. For the violations of Constitutional rights, the illegal acts and serious

damages experienced by plaintiff and "PENSIONER MINORITY" described in paragraphs above, plea is made pursuant to 28 USC 2201, the Declaratory Judgment Act, that PL 94-236 be declared unconstitutional.

WHEREFORE PLAINTIFF PRAYS FOR JUDGMENT

1. An injunction enjoining the Defendant "TRUSTEES", preliminary and permanent, from further sale of "TRS" corporate assets to purchase NY City obligations and the prevention of postponement of payment at maturity date of these obligations unless such action applies to all creditors equally.
2. Declaring PL 94-236 unconstitutional and invalid.
3. An injunction, preliminary and permanent, enjoining the enforcement of PL 94-236.
4. Setting aside the IRS December 5 and 13, 1975 approval of purchase of \$182 million NYC bonds under 5 USC 706(2).
5. Ruling that the "AGREEMENT" is void and invalid.
6. Require the exchange of the \$275 million of MAC bonds now bearing 6% for the originally purchased 11% bonds.
7. Award plaintiff the reasonable expenses of this action, including counsel fees if he can find counsel.
8. Grant such other relief as might be just and proper.

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF N. Y.

ALFRED KIRSHNER
98 Van Cortlandt Park South
Bronx, N. Y. 10463
Phone: 543 9038 Plaintiff

vs

CIVIL ACTION No. 77 CIV 665 (I B W)

NOTICE OF AMENDED COMPLAINT

United States of America.
Secretary of the Treasury.
Commissioner of I. R. S.
Alvin D. Lurie in his capacity
as Asst. Commissioner
Employer Plans & Exempt
Organizations, I. R. S.
c/o U.S. Attorney Civil Division
1 St. Andrews Plaza, 5th Floor
New York, N. Y.

Bernard Goldberg
Reuben Mitchell
Joseph Shannon
Robert Christen
Victor Condello
Harrison Golden
James Regan
Individually as "TRUSTEES" of TEACHERS
RETIREMENT SYSTEM OF CITY OF N. Y.
40 Worth Street, New York, N. Y.
Isaah Robinson Defendants
110 Livingston Street
Brooklyn, N. Y.
Individually as former "TRUSTEE" "TRS"

JURY TRIAL DEMANDED

SIRS:

PLEASE TAKE NOTICE that plaintiff Alfred Kirshner hereby moves under Rule 15 of the Federal Rules of Civil Procedure, to amend his complaint by adding and inserting
(i) at the end of Complaint paragraph 1 (one) after 26 USC 401 & 503;

and to secure enforcement of Rev. Rule 70-131, C.B.135.

(ii) in paragraph 9a (nine a), second sentence, amended to read:
All city and state public employee pensioners are excluded from
Erisa and protected only by 26 USC 401 and 503 and Rev. Rule
70-131, C.B.135, which holds that a pledge of the employers
general assets does not provide adequate security for purposes
of the prohibited transaction rules.

(iii) in paragraph 12 (twelve), amended to read:

The approval of the \$182 million NYC bond purchase by IRS letters
of December 5 & 13, 1975 was unlawful under 5 USC 702 because
it was arbitrary, not in accord with Rev. Rule 70-131, C.B. 135;
26 USC 401 and 503; (balance of paragraph as in original complaint
(iv) at the end of paragraph 16 (sixteen), after June 30, 1978;
and violating Rev. Rule 70-131, C.B.135.

Dated: Bronx, N.Y.
February 28, 1977

ALFRED KIRSNER, Plaintiff



98 Van Cortlandt Pk. So.
Bronx, N.Y. 10463
(212) 543 9038

AFFIDAVIT OF WILLIAM SCOTT FOR DEFENDANT,
IN OPPOSITION

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

-----x
SELMA R. SIMPSON,

Plaintiff,

-against-

REUBEN W. MITCHELL, et al.,

Defendants.
-----x

AFFIDAVIT

Index No. 20061/75

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

WILLIAM T. SCOTT, being duly sworn, deposes and
says:

1. I am the Third Deputy Comptroller of the City of New York and I am duly authorized to act and vote in the place of the Comptroller as a member of the board of Trustees of the New York City Teachers' Retirement System (the "Retirement System"). This affidavit is submitted in opposition to the plaintiff's application for a preliminary injunction.

2. I have served as Third Deputy Comptroller since January 1, 1974, and in that capacity I have "advise[d]"

Exhibit 1.

AFFIDAVIT OF WILLIAM SCOTT FOR DEFENDANT,
IN OPPOSITION

The Housing Development Corporation notes, purchased at par on August 15, 1975 with an interest rate of 10%, are secured by the properties of the Housing Development Corporation and guaranteed by the full faith and credit of the City.

15. Finally, the MAC bonds were purchased between August 21, 1975 and November 20, 1975, at an interest rate of 11%, except that 28 million dollars worth of the bonds bear an interest rate of between 9% and 11%. These obligations were purchased at par, with the exception of seventy-five million dollars in MAC bonds which were purchased at ninety nine and three quarters percent of par with twenty days of interest accrued prior to the date of purchase.

16. Payment of principal and interest on MAC bonds and notes and accumulation of designated reserves in a MAC capital reserve fund are provided for and backed by the proceeds of a State 4% sales and compensating use tax imposed within the City by the Legislature, and to the extent that such proceeds are not sufficient to provide for such payment and accumulation of reserves and, by a statutory mechanism whereby, under specified conditions, the proceeds of the stock transfer tax commencing April 1, 1976 and per capita State aid otherwise payable to the City are to be allocated for payment of such obligations and accumulation of such reserves. These tax proceeds and reserves are to be available to meet MAC's debt service and capital reserve requirements pursuant to appropriations by the Legislature.

17. Sections 1197 and 1210(1) and 1212 A(1) of the Tax Law (as added by L. 1975, ch. 168, §§2,4,5) provide in general

AFFIDAVIT OF WILLIAM SCOTT FOR DEFENDANT,
IN OPPOSITION

22. The maximum debt service payable on the MAC obligations currently outstanding is 453,477,088 dollars per year. The revenues referred to above available to MAC from the sales, use and stock transfer taxes alone total in excess of nine-hundred and seventy-three million annually. Consequently, MAC can be expected to have available to it annually more than twice the amount of money necessary to meet its annual debt service requirements.

23. Finally, as has been shown above, Public Authorities Law §§ 3036 and 3036-a mandate that MAC maintain a capital reserve funds for payment of interest and principal on its obligations.

24. The rate of return on the above-mentioned MAC obligations, City Bond Anticipation Notes and Housing and Development Corporation Notes purchased by the Retirement System, on the basis of a comparison with the rate of return on other, comparable securities, is favorable and beneficial to the Teachers' Retirement System. Moreover, the security of principal and the assurance of continued income provided by these obligations, notwithstanding the current market response thereto, are superior to that provided by the obligations of comparable commercial borrowers which are vulnerable to the vicissitudes of a commercially changing

AFFIDAVIT OF WILLIAM SCOTT FOR DEFENDANT,
IN OPPOSITION

marketplace. For these reasons I believe these investments were made prudently and in the best interests of the Retirement System.

24. In addition, I realize that investment by the Retirement System in MAC obligations is necessary to avert a default by the City. If the City should default, the consequences would be catastrophic, not only to the City but also to the Retirement System. The City makes substantial contributions each year to each of its pension funds. This past year, the City contributed to the Teachers' Retirement System \$296,000,000. The solvency and very existence of the Teachers' Retirement System depend on the annual contributions from the City. Should the City default, it is quite evident that these contributions would be jeopardized.

25. In conclusion, I strongly urge the Court to deny plaintiff's application for a preliminary injunction. Plaintiff has not demonstrated that either she or the Retirement System is likely to suffer irreparable injury if the preliminary injunction is denied. Plaintiff has submitted mere conclusory allegations to support their claims that MAC, City and State obligations are not sound investments. They have produced no evidence to overcome the facts set forth above demonstrating that MAC obligations are backed by revenues which, judged by exacting financial standards, are more than adequate to provide for required payments of principal and

AFFIDAVIT OF WILLIAM SCOTT FOR DEFENDANT,
IN OPPOSITION

interest. As is noted above, there is not at present any Board of Trustees' authorization to make further purchases of the obligations in question on behalf of the Retirement System. The plaintiff requests the Court to determine in the abstract and on unknown and uncertain hypothetical grounds whether future purchases might be injurious. An injunction issued without specific knowledge of the type of security to be purchased might in fact be extremely harmful to the Retirement System because it could not take into account the benefits which might accrue to the Retirement System from purchases which would be enjoined. In addition, I am advised that the Courts have laid down a rule of abstention from attempts to substitute a judicial appraisal for discretionary investment decisions of the trustees of public retirement systems. I am advised further that plaintiff has failed to show a clear legal right to the relief which she seeks, has failed to demonstrate a likelihood of success on the merits, and has failed to state a cause of action.

WHEREFORE, it is respectfully requested that plaintiff's application for a preliminary injunction be denied in all respects.

S/

WILLIAM T. SCOTT

Sworn to before me this

28th day of November, 1975

S/

Notary Public

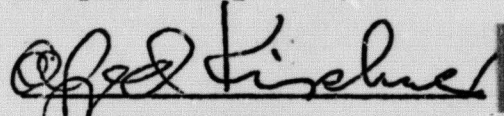
7. Plaintiff alleges additional wrongful acts in violation of 42 USC 1983 by TRS Trustee Defendants wilfully acting in conflict of interest for the benefit of the City of New York and the United Federation of Teachers at the expense of the interest of the plaintiff and the minority pensioners, as detailed in my affidavit and exhibits.

8. Plaintiff is neither a purchaser or seller of the securities but he has the same standing under SE Act 1934 as a stockholder who questions the legality of conflict of interest transactions by members of the Board of Directors of a public Corporation.

9. The allegation of violation of Rule 10b-5, SE Act 1934 by TRS Trustees is a question of fact that has not yet been determined.

Dated: New York, N.Y.
March 15, 1977

Respectfully submitted,



Alfred Kirshner, Plaintiff
98 Van Cortlandt Park South
Bronx, N.Y. 10463
Tel: 212 543 9038

TO: Attorneys for Defendants:
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One St. Andrews Plaza
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